APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,401

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

No. 12,403

LONG ISLAND LIGHTING COMPANY, PUBLIC SERVICE ELECTRIC AND GAS COMPANY, *Petitioners*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION

Argued March 21, 1958

Before KALODNER, STALEY and HASTIE, *Circuit Judges*.

Opinion of the Court

(Filed June 30, 1958)

By STALEY, *Circuit Judge*.

Serious questions involving the authority of the Federal Power Commission are presented in these petitions to review an order of the Commission granting certificates

of public convenience and necessity pursuant to Section 7(e) of the Natural Gas Act, 15 U.S.C. § 717f(e).

Oil leases in the Gulf of Mexico off the shore of Cameron and Vermilion parishes in Louisiana are owned by four independent producers of natural gas, Cities Service Production Company, The Atlantic Refining Company, Tidewater Oil Company, and Continental Oil Company. They are referred to collectively as the CATCO companies. In the early part of September, 1956, CATCO applied to the Federal Power Commission for certificates of public convenience and necessity for authority to sell their natural gas to Tennessee Gas Transmission Company, pursuant to contracts executed in August, 1956. Later in September, 1956, Tennessee Gas itself applied for a certificate of public convenience and necessity for authority to expand its facilities in preparation for the purchase of the gas from CATCO.

The contracts between the CATCO producers and Tennessee Gas provided for an intial rate of 22.4 cents per Mcf (including one cent gathering tax reimbursement), with an automatic increase of two cents every four years thereafter. The highest rate Tennessee Gas had previously paid for natural gas in the area was 18 cents per Mcf. The offshore gas fields in question represent the largest reserve ever committed to one sale, and the sale proposed is the first from the newly developed fields which will provide impressive proportions of future gas supply.

Hearings were begun on the CATCO applications on February 28, 1957. Petitioner Public Service Commission of the State of New York, which exercises general regulatory supervision over the gas industry in that state, intervened in the proceedings. An order of the respondent Commission permitted intervention also of four distributing company customers of Tennessee Gas, namely, Long Island Lighting Company, Public Service Electric and Gas Company, Brooklyn Union Gas Company, and Lake Shore Pipe

Line Company. Tennessee Gas was the only intervenor in favor of the CATCO applications.

In the latter part of March, 1957, the presiding examiner's decision ordered the issuance of certificates of public convenience and necessity to the CATCO applicants without conditions as to price, and conditioned only upon the issuance of a certificate to Tennessee Gas for the construction of its necessary facilities.

After exceptions were filed by intervenors, the respondent Commission issued its order of April 22, 1957. It directed the issuance of temporary certificates to the CATCO applicants, but remanded the proceedings to the examiner to determine what initial rates would accord with public convenience and necessity. After reviewing the circumstances which rendered this sale one of extreme importance both as to initial rate and as to the enormous volume of gas proposed to be sold, the Commission found:

> "Those factors make it abundantly evident that, in the public interest, this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest."

The CATCO applicants moved to modify that order, alleging that the economic risk involved would foreclose their acceptance of temporary certificates issued by the respondent Commission. Further, the applicants proposed to change their contracts so as to give the Commission continuing supervision of the proposed sale and future price increases regardless of any change Congress might make in the Natural Gas Act. The initial rate in the contract would stay at 22.4 cents per Mcf, however. No further evidence as to the reasonableness of the initial rate was presented.

The second order, issued May 20, 1957, demonstrated the Commission's desire to extend itself in an effort to be fair to the applicants while protecting the ultimate consumers from rates which might later be determined ex-

cessive. This order, however, still recognized that there was insufficient evidence in the record on which to base a finding that public convenience and necessity required sale of the gas at the initial rate proposed. The plan embodied in the Commission's order was intended to permit the sale of the gas as soon as possible and was to be effectuated in the following manner. Without remanding the proceedings to the examiner, permanent certificates would be issued conditioned upon the initial rate of 18 cents (including the one cent gathering tax reimbursement). The CATCO companies would be entitled to file for a rate increase to 22.4 cents per Mcf to be effective one day after the commencement of gas deliveries to Tennessee Gas.[1]

The Commission reasoned that the consumers would thereby not be relegated to the cumbersome and time-consuming procedure of a Section 5 proceeding where the burden would be on the Commission to show the rates unreasonable and where there are no provisions for refund in the event the Commission is able to meet its burden. The order, though unusual, was deemed necessary by the Commission to protect all parties concerned.

Still the CATCO applicants were not satisfied, and their dissatisfaction this time was expressed by Tennessee Gas in an application for rehearing filed June 4, 1957, which in part states:

> "Tennessee has been definitely advised by the producer-applicants that they will not amend Section 10 of the contract so as to change the initial rate from 21.4 cents per Mcf to 17 cents per Mcf. [The rates

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[1] Under Section 4 of the Natural Gas Act, the Commission is empowered to suspend rate increases up to a period of five months, but it waived this power by its promise to the applicants to limit suspension to a 24-hour period. The net result would have been to permit the sale almost immediately at the initial rate proposed in the contracts, allow the CATCO applicants the opportunity of proving by Section 4 proceedings that the rate was just and reasonable, and protect the consumers of Tennessee Gas from overpayment by means of the refund provisions of Section 4 in the event CATCO could not meet its burden.

exclude the tax.] Tennessee has been further informed by the producer-applicants that the certificates issued by said order will not be accepted by them for that reason, and that, accordingly, the contracts will be terminated. * * *"

A rehearing was held on June 12, 1957. No further evidence was added to the record. Counsel for the CATCO companies made it clear that unless CATCO received certificates not conditioned with initial rates they might deem objectionable, they would seek to dispose of their gas elsewhere than in the interstate market.

Impressed with this threat, the Commission issued its order of June 24, 1957, in which it granted permanent certificates of public convenience and necessity to the CATCO applicants without any condition affecting the initial price of 22.4 cents per Mcf as originally provided in the contracts with Tennessee Gas. Commissioner Connole dissented. It is this order which petitioners ask us to review.[2]

Tennessee Gas, CATCO, and the Commission argue that the petitioners have no standing to ask this court to review the order of June 24, 1957, because they are not "aggrieved" as required by Section 19(b) of the Act. Essentially, the petitioners represent the ultimate consumers of the gas. In Natural Gas Pipeline Company of America v. Federal Power Commission, 252 F.2d 3 (C.A.3, 1958), cert. pending, we held that a gas transmission company which has passed its increases on to its customers is "aggrieved," since as a matter of ethics and good business, it is required to protect its customers. Here the petitioners are more nearly representative of the ultimate consumers than was

[2] The petitioners pursuing their remedies in this court are Public Service Commission of the State of New York (No. 12,401), and Long Island Lighting Company and Public Service Electric and Gas Company (No. 12,403). Though these are separate petitions for review, we are disposing of both in one opinion. An order of this court issued October 22, 1957, permitted the CATCO companies and Tennessee Gas to intervene in support of the Commission's order under review.

Natural Gas Pipeline Company in that case. Furthermore, when it is considered that New York distributors are supplied by Tennessee Gas, that the contract price approved by the Commission's order is 4.4 cents higher than any other price paid by Tennessee Gas, that this is the first sale from new fields which will supply enormous quantities of gas in the future, and that the Commission's order in effect places the burden on the petitioners to show that the rates are unreasonable, it is clear the argument that petitioners are not "aggrieved" is without substance.

The suggestion that petitioners have not exhausted their administrative remedies is equally lacking in merit. The final order of the Commission granted unconditional certificates of public convenience and necessity. Rehearing has been denied. Judicial review is the next step, and the suggestion of unsatisfactory administrative remedies which are no remedies at all cannot displace this review.[3]

The petitioners pose substantially similar questions on the merits of the case, namely, whether the Commission committed error in its order of June 24 in dispensing with the consideration of the element of price because of the threat of the producers to withhold the gas from interstate commerce, after two previous determinations by the Commission that the sale should not be certificated without evidence in the record that the initial rate was just and reasonable. We conceive of the question, however, as a more fundamental one, involving the statutory jurisdiction of the Federal Power Commission. It is whether the Commission has authority to consider an application for a certificate under Section 7(e) where the terms of the application limit the scope of the inquiry which the Commission is required to make for a determination of public convenience and necessity.

The Commission is empowered by Section 7(e) of the Natural Gas Act to attach reasonable conditions to its

[3] Proceedings under Section 5 of the Act foreclose any possibility of refund to the petitioners of amounts which later may be determined to be excessive.

issuance of certificates of public convenience and necessity.[4] One of the conditions the Commission often attaches is the stipulation of the initial rate. The legislative history of Section 7(e) indicates clearly that Congress intended to give the Commission full scope in scrutinizing the rate structure proposed in passing on the issuance of the certificate. Signal Oil and Gas Co. v. Federal Power Commission, 238 F.2d 771, 774, note 3 (C.A.3, 1956), cert. denied, 353 U.S. 923 (1957). In the Signal Oil case, this court reaffirmed the statutory authority of the Commission to impose rate conditions where the public convenience and necessity required it. When the Signal Oil case was before the Commission, it said that the justness and reasonableness of the rate was a "vital element" in demonstrating "that the service proposed is or will be required by the present or future public convenience and necessity." Cities Service Gas Co., et al., 12 P.U.R. 3d 3, 14 (1955). According great weight to the initial rates proposed has been the policy of the Commission over the years as is indicated in its annual reports to Congress.[5]

While the Commission probably should always consider the impact of the proposed initial rate in its determination of public convenience and necessity, we do not reach the question of whether the Commission must fix the initial rate when its inquiry demonstrates that there is a substantial question of the reasonableness of that initial rate. See Oklahoma Natural Gas Co. v. Federal Power Commission, and the dissenting opinion of Judge Bazelon, D.C. Cir., 257 F. 2d 634, 642.

In the cases before us, the Commission has left no doubt of the importance and necessity of a consideration of the reasonableness of the proposed initial rate. In its first order issued April 22, 1957, the Commission said:

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[4] "* * * The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

[5] See dissent of Judge Bazelon in Oklahoma Natural Gas Co. v. Federal Power Commission, D.C. Cir., 257 F. 2d 642.

"The record contains insufficient evidence or testimony, however, on which to base a finding that the public convenience and necessity reqnires the sale of these volumes of gas at the particular rate level here proposed. The importance of this issue in certificating this sale cannot easily be overemphasized. This is the largest reserve ever committed to one sale. This is the first sale from the newly developed offshore fields from which large proportions of future gas supplies will be taken. This is the highest price level at which the sale of gas to Tennessee Gas has been proposed.

"Those factors make it abundantly evident that, in the public interest, this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest."

Again, in its order of May 20, 1957, the Commission said:

"* * * As we have already stated, the record does not contain sufficient evidence on which to base a finding that the public convenience and necessity requires the sale of the gas at that particular rate level. * * *"

It was only after the threat of withholding the gas from the interstate market that the Commission retreated from its previous position and granted the certificates without rate conditions by its order of June 24, 1957.[6] Commissioner Connole, in his dissent from this order, puts the problem into sharp focus:

"The record is plain that the controlling reason the parties refuse to submit their contracts to regulatory review in the manner found to be necessary in the public interest is their preference for a proceeding in

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[6] It is abundantly clear that the Commission changed its mind about the necessity of establishing that the proposed rate was in the public interest only because of the threat of the producers to withhold the gas from the interstate market unless they got certificates upon their own terms. The producers expressed themselves unequivocally through the application of Tennessee Gas for rehearing directed to the order of May 20, 1957, and further in oral argument at that rehearing.

which the burden would be on the Commission to establish that the rate was more than reasonable. They flatly refuse to submit to one in which the parties would be required to show only that the rate was required by the public convenience and necessity. No citation of authority or reference to regulatory theory is needed to demonstrate that the burden of showing the public convenience and necessity requires a proposed service at a particular price level is on the party seeking to take advantage of the proposed service and not on the tribunal before which the case is to be made. Under the unique conditions found here, the critical importance of that decision is indisputable."

The Commission defends its action by claiming the right to change its mind just as a court might do on rehearing, citing Cia Mexicana de Gas v. Federal Power Commission, 167 F.2d 804 (C.A.5, 1948). The petitioners, however, do not argue to the contrary. Their position is that, since in its first two orders the Commission determined that the record lacked sufficient evidence upon which to base a finding that the sale at the proposed rate would be in the public interest, and as the final order was based upon the same record, there is still insufficient evidence to support such a necessary finding.

The jurisdiction of the Federal Power Commission is entirely statutory. It acts as an arm of Congress, and only as Congress has directed it. It is empowered to grant certificates of public convenience and necessity by Section 7(e) of the Natural Gas Act.

"Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to per-

form the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. * * *"

The Act entrusts to the Commission, and to the Commission alone, the power and authority to determine the issue of public convenience and necessity. Within the framework of the Natural Gas Act, the Commission alone is entrusted with determining the scope of its inquiry necessary to arrive at the decision of whether to certificate a specific sale. It will be remembered that in its reports to Congress, the Commission has recognized that the element of price is important in determining whether a sale such as this should be approved, and as has been stated above, both the statute and the courts have recognized the authority of the Commission not only to take price into consideration but to condition a certificate for the sale of gas at a particular rate. In the present case, that the initial rate was a necessary consideration in the scope of inquiry into the determination of public convenience and necessity has been twice recognized by the Commission, even to the extent that its order of May 20, 1957, in fact conditioned the permanent certificates upon a contract amendment as to the initial price.

The Commission has jurisdiction to issue certificates under Section 7(e) based upon its independent judgment after an untrammelled consideration of all the elements which it deems necessary to arrive at that judgment. Congress has not given the Commission power to inquire into the issue of public convenience and necessity where, as here, the applicant circumscribes the scope of that inquiry by attaching a condition to its application requiring the Commission to forego the consideration of an element which

may be necessary in the formulation of its judgment. Otherwise stated, the Commission has not been endowed by Congress with jurisdiction to conduct a *limited* inquiry.

Congress has also made it clear that the applicant must be *willing* to perform the services proposed and conform to the provisions of the Act. The action of the applicants in curtailing the decision-making power of the Commission demonstrates their unwillingness to conform to the provisions of the Act; this in itself would require the denial of the applications. The Commission's function is to regulate the sale of gas by producers willing to sell under regulations arrived at in accordance with the provisions of the Act. Such regulations may not be the result of bargaining with an unwilling seller.

The order of the Federal Power Commission of June 24, 1957, will be vacated, and the proceedings will be remanded to the Commission with directions to proceed in conformity with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Judgment

This cause came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of June 24, 1957 of the Federal Power Commission be, and it is hereby vacated, and the proceedings remanded to the Commission with directions to proceed in conformity with the opinion of this Court

Attest:

IDA O. CRESKOFF
Clerk

June 30, 1958

APPENDIX B

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Frederick Stueck, Acting Chairman; Seaborn L. Digby, William R. Connole and Arthur Kline.

In the Matters of

CONTINENTAL OIL COMPANY

Docket No. G-11024

THE ATLANTIC REFINING COMPANY

Docket No. G-11034

CITIES SERVICE PRODUCTION COMPANY

Docket No. G-11046

TIDEWATER OIL COMPANY

Docket No. G-11049

Order, Upon Application For Rehearing, Adopting Initial Decision of Presiding Examiner With Modifications and Conditions

(Issued June 24, 1957)

On June 4, 1957, Tennessee Gas Transmission Company (Tennessee Gas) filed an application for rehearing and reconsideration of the Commission's order issued in these proceedings on May 20, 1957. By order issued June 6, 1957, we granted rehearing and in such order provided for oral argument "upon the contentions made and issues presented by the application for rehearing, the motion for modification and the answers thereto heretofore filed in these proceedings."[1]

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[1] On May 6, 1957, Continental Oil Company; The Atlantic Refining Company, Cities Service Production Company and Tidewater Oil Company (collectively referred to as CATCO) filed a motion for modification of the Commission's order issued April 22, 1957, granting temporary certificates of

Pursuant to the ordr granting rehearing we heard oral argument on June 12, 1957.

The Commission's order issued May 20, 1957, modified an earlier order issued April 22, 1957, granting temporary certificates of public convenience and necessity to CATCO and to Tennessee Gas in Docket No. G-11107.

The temporary certificates issued by our order of April 22, 1957, authorized CATCO to sell natural gas to Tennessee Gas from CATCO's leases in the East Cameron, West Cameron and Vermilion areas off the coast of Louisiana in the Gulf of Me. ico, and authorized Tennessee Gas to construct and operate approximately 107 miles of pipeline from the off-shore platforms of CATCO to a point on its main system at Kinder, Louisiana.

The contracts for the sale of gas executed between each of the CATCO companies and Tennessee Gas which are exhibits in these proceedings provide for an initial price of 21.4 cents per Mcf[2] and for a definitely fixed price escalation of two cents per Mcf every four years.

As has been indicated hereinbefore, the CATCO companies filed a motion for modification of the Commission's order issued April 22, 1957. In the motion the CATCO companies indicated that they were unwilling to accept temporary certificates of public convenience and necessity under the conditions specified in the Commission's Order. They, however, proposed that the Commission issue permanent certificates permitting them to charge the initial agreed-upon price to 21.4 cents per Mcf,

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public convenience and necessity to CATCO and Tennessee Gas and directing that the proceedings "be remanded to the presiding examiner to determine at what rate the public convenience and necessity requires the sale of natural gas by CATCO to Tennessee Gas to be made if these CATCO companies are granted permanent certificates of public convenience and necessity." Answers to the motion were filed by New York Public Service Commission, Lake Shore Pipe Line Company, Brooklyn Union Gas Company and Long Island Lighting Company (jointly), and Public Service Electric and Gas Company (collectively referred to as Interveners) opposing the motion. Tennessee Gas filed an answer supporting the motion.

[2] Reimbursement for the one-cent Louisiana gathering tax would be added to this amount.

but agreed to modify therein respective contracts for the sale of natural gas to Tennessee Gas in such manner that the future price escalations contained in the contracts would remain subject to the Commission's scrutiny and jurisdiction in the event the Harris Bill, H.R. 6790, 85th Cong., were enacted into law. The proposed contract amendments would provide that if the Harris Bill were enacted, the price for gas would escalate up to the then current reasonable market price but not more than two cents per Mcf every four years.

In response to the motion we issued our May 20, 1957, order in which we granted permanent certificates of public convenience and necessity to the CATCO companies on condition that the contracts between the CATCO companies and Tennessee Gas be amended so as to provide for an initial price of 17 cents per Mcf, with provision for filing a request for an increase in such price to 21.4 cents per Mcf one day after the initial price became effective. Under the condition provision we also made for the incorporation in such contract of indefinite price escalations, with a ceiling increasing by two cents every four years.

In its application for rehearing filed June 4, 1957, Tennessee Gas has stated that it had been advised that the CATCO companies were unwilling to accept the permanent certificates of public convenience and necessity granted by the May 20, 1957, order because they objected to the pricing and other conditions specified in the order, and that they would terminate the contracts so that the large supply of gas contained in the off-shore reserves of the CATCO companies would not become available to the customers of Tennessee Gas. At the oral argument it became apparent that the CATCO companies objected to the 17-cent initial price set in the May 20, 1957, order. On the other hand, the CATCO companies indicated that they would still be willing to amend their contracts as proposed in their motion of May 6, 1957. They indicated further that if they failed to obtain certificates without price con-

ditions which they considered objectionable, they would seek to dispose of their gas elsewhere than to Tennessee Gas and the interstate market.

In the present status of the case we are left with the difficult problem of how to assure the delivery of this gas to the large market served by Tennessee Gas, and at the same time protect the consumers from an unreasonably high price. In reaching a solution to this problem we are moved by the primary consideration that the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas. Further, it appears to us, important as it the issue of price, that as far as the public is concerned, the precise charge that is made initially is less important than the assurance of this great supply of gas. In view of these circumstances and the fact that the record does not show that the 21.4- cent rate is necessarily excessive, we agree with the presiding examiner that this certificate proceeding under Section 7 of the Natural Gas Act should not assume the character of a rate proceeding under Section 5(a). We are of the opinion that, in the circumstances of this case, in view of the great demand for gas by customers of Tennessee Gas, the price consideration should not be made the prime determinant of what the public convenience and necessity require. By virtue of the authority conferred upon us by Sections 4 and 5 of the Natural Gas Act and the proposal to modify the contracts made by the CATCO companies, we are of the opinion that we will be able to adequately protect the public interest with respect to the matter of price. In order, therefore, to insure that deliveries of gas by the four CATCO companies to Tennessee Gas will commence as promptly as possible, we will grant permanent certificates to them by this order without any condition affecting the initial price of 21.4 cents per Mcf.

However, because the 21.4-cent price, as we have heretofore observed, is higher than Tennessee Gas is paying under any other contract, it should be subject to prompt

investigation under Section 5 (a) as to its reasonableness. In this connection, we may note that when three of the CATCO companies, Continental Oil, Atlantic Refining and Tidewater Oil file their contracts with Tennessee Gas as rate schedules as required by the Natural Gas Act and our Regulations, such contracts will be subject to rate investigations now outstanding against these companies. Thus, by our order issued January 27, 1956, in Docket Nos. G-9283 and G-9284, we instituted an investigation of any of the rates or charges of Atlantic Refining and Tidewater Oil with respect to any transportation or sale of natural gas subject to our jurisdiction, and by our order issued the same day in Docket No. G-9279, we instituted a similar investigation of the rates and charges of Continental Oil. Concurrently with this order we are instituting in Docket No. G-12780 an investigation of the rates and charges of Cities Service. By this means relief can be afforded to the consuming public if it should be found that the 21.4-cent initial rate to be charged for the offshore gas is excessive.

It appears to be true that if the Harris Bill, H.R. 6790, 85th Congress, or some bill similar to it, becomes law that we may lose continuing supervision over the future increased prices provided in the several contracts between the CATCO companies and Tennessee Gas. Therefore, we shall adopt the proposal of the companies made in their motion for modification of May 6, 1957, that they amend their contracts so that the price increases will remain subject to our control by using "indefinite pricing clauses" rather than "definite pricing clauses" within the meaning of the Harris Bill. They propose to do this, as indicated above, by providing that the initial sales price shall be 21.4 cents per Mcf until November 1, 1962, as at present, but after that the "reasonable market price" within the meaning of the bill and as determined by this Commission shall prevail. Adjustments would be initiated by the sellers at four-year intervals but would be limited by the

step increases now provided in the contracts. The CATCO companies state that Tennessee Gas is agreeable to this arrangement and will enter into such an amendment with each of the CATCO companies.

The Commission finds:

(1) It is necessary and appropriate in the public interest to adopt the initial decision of the presiding examiner with modifications and conditions and to modify the Commission's order issued May 20, 1957, in the above-entitled proceedings, in the manner set forth below.

(2) The CATCO companies are able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Natural Gas Act, and the requirements, rules, and regulations of the Commission thereunder.

(3) The sales of natural gas by the CATCO companies to Tennessee Gas, as referred to above, together with the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, are required by the public convenience and necessity, and permanent certificates therefor should be issued as hereinafter ordered and conditioned.

The Commission orders:

(A) Permanent certificates of public convenience and necessity are hereby issued to the CATCO companies, without further hearing, authorizing the sale of natural gas to Tennessee Gas, from CATCO's leases in the East Cameron, West Cameron and Vermilion areas off the coast of Louisiana in the Gulf of Mexico, together with the construction and operation of any facilities, subject to the jurisdiction of the Commission, used for such sale, as hereinbefore described and as more fully described in the application in this proceeding.

(B) Each of the CATCO companies, within 20 days after the issuance of this order, shall file with the Commission

a duly executed amendment to the contract submitted as an exhibit to its certificate application providing for sale of natural gas to Tennessee Gas embodying the following language:

> If and in the event that H. R. 6790 or any substantially similar legislation is enacted into law by the 85th Congress, and becomes effective, then the provisions of Section 10, *Prices,* commencing with the portion thereof reading
> "From the date of initial delivery or November 1, 1957. whichever occurs first,
> until November 1, 1962.....21.4 Cents per MCF"
> to and including that portion thereof reading
> "From November 1, 1986 to expiration
> of this contract.....35.4 Cents per MCF"
> is hereby deleted, and the following is substituted in lieu thereof:
> From the date of initial delivery or
> November 1, 1957, whichever occurs first,
> and thereafter.....21.4 Cents per MCF
> Provided that, After November 1, 1962, Seller shall be entitled to receive and Buyer shall pay the reasonable market price, if higher than 21.4 cents per Mcf, for the gas at the points of delivery within the limitations and subject to the terms and conditions as hereinafter set forth. Such reasonable market price shall be that as fixed by the Federal Power Commission under applicable law, after initial determination thereof by Seller as herein provided. If Seller should determine that the reasonable market price for the gas at the points of delivery for any of the 4-year periods hereinafter listed would be in excess of the price then being paid hereunder, Seller may notify Buyer, not less than eight months prior to the commencement of such period, of the price to be paid by Buyer hereunder during such period and until a subsequent determination by Seller

in accordance herewith is made effective. Any price so determined and fixed shall be not less than 21.4¢ per Mcf and not more than:

23.4 Cents per MCF	From November 1, 1962 to November 1, 1966
25.4 Cents per MCF	From November 1, 1966 to November 1, 1970
27.4 Cents per MCF	From November 1, 1970 to November 1, 1974
29.4 Cents per MCF	From November 1, 1974 to November 1, 1978;

and in the event the term of this contract is extended hereunder beyond November 1, 1978, then not more than

31.4 Cents per MCF	From November 1, 1978 to November 1, 1982
33.4 Cents per MCF	From November 1, 1982 to November 1, 1986
35.4 Cents per MCF	From November 1, 1986 to the expiration of this contract.

Except as altered hereinabove, the provisions of Section 10, *Prices*, shall remain unaffected and in full force and effect.

(C) The certificates issued herein shall be accepted in writing and under oath by each of the CATCO parties, each of whom shall be authorized to commence service upon acceptance and upon completion of construction of the "offshore facilities" by Tennessee Gas. Each acceptance shall be accompanied by a resolution of the Board of Directors of the accepting company duly authenticated indicating the approval of the acceptance of the certificates hereby granted.

(D) The certificates issued herein are not transferable and shall be effective only so long as each CATCO company continues the acts or operations hereby authorized in ac-

cordance with the provisions of the Natural Gas Act, and the applicable rules, regulations and orders of the Commission.

(E) The grant of the certificates herein shall not be construed as a waiver of the requirements of Section 4 of the Natural Gas Act, or of Part 154 of the Commission's Rules and Regulations thereunder requiring the filing of rate schedules for the services herein authorized; and is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against the CATCO companies. Further, our action in this proceeding shall not foreclose nor prejudice any future proceedings or objection relating to the operation of any price or related provision in the gas purchase contracts herein involved.

(F) The findings of fact and the conclusions of the presiding examiner are hereby adopted except where inconsistent with this order.

(G) Our order issued May 20, 1957, is hereby modified to the extent that it is inconsistent with this order.

By the Commission. Commissioner Connole dissenting.

JOSEPH H. GUTRIDE,
Secretary.

In the Matters of

CONTINENTAL OIL COMPANY, ET AL.

Docket No. G-11,024, *et al.*

(Issued June 24, 1957)

CONNOLE, Commissioner, *dissenting:*

The manifest unwillingness of the producers here involved to submit to properly constituted public authority the prices at which they propose to make these significant

sales in interstate commerce has precipitated a crisis for consumers and Commission far out of proportion to the importance of the immediate proceeding. The depth of the crisis was well expressed at the oral argument of June 12, 1957. Producers represented that unless we abandoned our position in this matter it would be their decision to withdraw this gas from the interstate market. Representatives of consuming interests and of metropolitan distributing companies contended it would be preferable to risk curtailment of expansion and, by necessary implication, certainty of supply rather than to permit the Commission to depart from the position taken in our prior Orders in this docket.

This proceeding is another example of the manner in which the skyrocketing demand for natural gas is severely straining the industry's price structure. Demand threatens to elevate price levels beyond customer tolerance. As a result each proposed sale at new high price levels must be evaluated with particular care. Avoiding the disastrous consequences of a collision between consumers' needs for additional gas and producers' demands for additional compensation is particularly difficult in this proceeding because producers have presented the Commission with an almost classic Hobson's choice. In addition, the issues have become expanded in scope and effect until far more than the initial price level of this particular sale is involved. As I see it, the validity of the Commission's judicially approved right to attach a rate condition to certificates of public convenience and necessity when it is called for, and in fact, the very inviolability of all Commission orders is at issue here.

It is clear from the history of this proceeding that we have made unprecedented efforts to ensure fair treatment, that we have clearly evidenced our intention to cooperate in arriving at an initial price level that would be just and reasonable to all parties affected. Despite these efforts, however, the producers remain adamant. Despite ample administrative and judicial authority to the

contrary[1] they insist that a proposal to make a sale of natural gas in interstate commerce is not subject to regulatory review to determine if the public interest requires that it be made at the prices proposed.

The record is plain that the controlling reason the parties refuse to submit their contracts to regulatory review in the manner found to be necessary in the public interest is their preference for a proceeding in which the burden would be on the Commission to establish that the rate was more than reasonable. They flatly refuse to submit to one in which the parties would be required to show only that the rate was required by the public convenience and necessity. No citation of authority or reference to regulatory theory is needed to demonstrate that the burden of showing the public convenience and necessity requires a proposed service at a particular price level is on the party seeking to take advantage of the proposed service and not on the tribunal before which the case is to be made. Under the unique conditions found here, the critical importance of that decision is indisputable.

So much has been said in other forums, so many and so unanimous are the authorities in support of it, that to argue that validity and equity of the procedure contemplated by our prior Orders and supported by the *Signal Oil* case, *supra*, would serve no useful purpose now. At this tardy date the unbeliever needs inspiration, not persuasion, if the veil of obstinacy is to be removed from his eyes.

Of more immediate consequence, however, is the dilemma into which the refusal has placed this Commission and the consumers whose interest we must protect. Denial of essential supplies on the one hand, and on the other, inadequate protection against unjust and unreasonable rates.

It contributes nothing to argue that the issue here is sanctity of contract. When it applies, no one feels the

[1] See *Cities Service Gas Co., Signal Oil and Gas Co.*, 14 F.P.C. —, Opinion No. 288, Nos. G-2569, G-2570, November 28, 1955, affirmed as *Signal Oil and Gas Co.* v. *F.P.C.*, 238 F. 2d 771 (CA3), *certiorari* denied 353 U.S. 923.

force of that argument more keenly than I. And when it was threatened, I spoke out against it. For example, see my separate statement *In the Matters of American Louisiana Pipe Line Company, et al.*, G-10396, *et al.*, issued January 11, 1957.

But no contract terms are involved here. No party questions the manner in which the other has carried out its part of a bargain. If anything, an essential party to the contracts has been crowded out of the bargaining table. And rather than to permit the public interest a place, the bargainers would turn the table upside down and walk away from the entire proceeding.

Plain facts are that the gas has been placed on the interstate market on one set of terms and one only. This Commission and the consumers who have made irrecoverable investments in order to use it, are given no choice but to accept. The arbitrary nature of this position appears from an examination of the orders which have been rejected by the producers.

No voice has been raised to dispute the facts that were set out so clearly in our Order of April 22, 1957. To my legal understanding they are still facts. A few sentences will illustrate (pg. 2, mimeo):

> "The record contains insufficient evidence or testimony however, on which to base a finding that public convenience and necessity requires the sale of these volumes of gas at the particular rate level here proposed. The importance of this issue in certificating this sale cannot easily be overemphasized. This is the largest reserve ever committed to one sale. This is the first sale from the newly developed offshore fields from which large proportions of future gas supplies will be taken. This is the highest price level at which the sale of gas to Tennessee Gas has been proposed.
>
> "These factors make it abundantly evident that, in the public interest, this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest. . . ."

No effective objection has been made to our Order of May 20, 1957. The upper limit of the price range used by the Commission in that Order was set by the contracts themselves which the record discloses contain the highest of at least four bid prices. The lower limit was urged by disinterested public authority intervenors and supported by evidence of record showing, among other things, that it was the highest price presently being paid by Tennessee Gas for the purchase of any gas produced in the Southwest area. Effectively, the Order provided a floor which the rates would not penetrate, an assurance notably lacking in the Section 5(a) procedure so zealously embraced by the applicants. And still the refusal persists.

Nothing but threats by the producers supports the proposition that this gas would be barred forever from the interstate market. And the very quantity of offshore gas affected by this decision makes it clear that the only practical market for gas of this kind for years to come is to the large consuming areas served by the long haul interstate pipelines. In my judgment the pricing pattern should not be set for so crucial a supply source in an atmosphere charged with urgency and in response to arguments whose primary motivation is private, not public, gain. The election by the producers to reject their public responsibility and insist on exercising the full strength of their bargaining position has altered completely the impact of logical and equitable arguments.

The decision of the majority is justifiable only by the evil consequences of the loss of these reserves to the particular pipeline which is a party to the contracts. Such evils would, in the opinion of the majority, exceed the gain to follow from the proof that the public convenience and necessity does not require the sale of this gas at proposed rates.

In my opinion, the consequences of abandoning our position will be more serious than their effect on this particular sale. Whether by design or accident, the issues in this

proceeding now transcend the close limits of the original hearing. At stake is the question whether the Commission should hold a position which it has determined is in the long run public interest, or whether it should abandon it when confronted with allegations that short run injury to one segment of the industry and consumers might result. Where the issue is reduced to this simple statement, the answer is clear.

Majority quite properly are concerned that persisting in either our April 22 or our May 20 Order will result in cancellation of the CATCO-Tennessee contracts. I agree it probably would. And quite understandably the majority refuses to permit a few distributing companies and one Public Service Commission to dictate the interests of all other consumers on Tennessee's lines. Unfortunately, however, there is more to this issue.

As concerned as I am for Tennessee's customers, I am more concerned for the whole body of consumers on *all* transmission pipe lines for whose protection we are responsible. And as deserving of preservation as I believe those particular Orders to be, I believe the principle that Federal regulatory Orders should not be changed by threats of abandoning public responsibility is even more important.

On balance, and in view of the expansion of the issues beyond those originally contemplated by this docket, I believe it more important to the public interest to preserve the Commission's authority to make lawful and necessary orders than it is to preserve these contracts as written. The right to maintain valid orders against allegations of urgency, the importance to the consumer of the *Signal Oil* doctrine, and the right of *all* consumers for protection against unreasonable initial rates outweight the potential damage to the consumers of Tennessee Gas Transmission which might flow from maintaining the position I urge here.

While dissenting may appear to serve no useful purpose, the damage to consumer and to the public interest, to the regulatory process, and to the future of the interstate natural gas business as it is given me to discern it, would be such under the majority decision that, inevitable as that decision may appear to be, I am left no choice but to protest it by filing a dissenting vote.

I dissent from the action of the majority in this cause.

WILLIAM R. CONNOLE, *Commissioner*

APPENDIX C

The pertinent provisions of the Natural Gas Act of June 21, 1938, c. 556, 52 Stat. 821; as amended by Act of February 7, 1942, c. 49, 56 Stat. 83; 15 U.S.C. 717-717w, are as follows:

Sec. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such

rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and publised.

(e) Whenever any such new schedule is filed the Commision shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the pro-

ceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U.S.C. § 717c]

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Sec. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract

to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

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Sec. 7. (c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bonafide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f (c)]

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require. [56 Stat. 84 (1942); 15 U.S.C. § 717f (d)]

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise, such

application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f(e)]

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Sec. 19. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall

certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

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